

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

October Term, 1977

No. ... **77-1348**

THE STATE OF CONNECTICUT,

Petitioner,

v.

RALPH PENLAND,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT

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IN THE
Supreme Court of the United States

October Term, 1977

No.

THE STATE OF CONNECTICUT,

Petitioner,

v.

RALPH PENLAND,

Respondent,

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT**

The petitioner, the State of Connecticut, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on January 3, 1978.

I. Citation

A decision of the Connecticut Supreme Court, *State v. Ralph Penland*, Vol. XXXIX, No. 27, Conn. L.J. p. 3 (January 3, 1978), a copy of which is annexed hereto. Said decision is reported as *State v. Penland*, —Conn.—, —A.2d— (1978).

II. Jurisdictional Grounds

On January 3, 1978, the Connecticut Supreme Court entered judgment upholding the dismissal of charges against Ralph Penland for the crime of possession of narcotics. The Jurisdiction of this Court is invoked under authority of 28 U.S.C. Section 1257 (3).

III. Questions Sought to be Reviewed

A. Was probable cause established where an informant reported that he had just observed a possession and sale of narcotics by two individuals at a specified location and advised that they would leave the location within minutes and enter a particular car described by the informant, and the officer receiving the information, who knew the two individuals from previous narcotics investigations, went to the scene within minutes and observed both individuals leave together and enter the particular car?

B. Where the officer acts upon this information and alleges that the informant had been reliable in the past, should the Court suppress the use of the evidence seized upon the arrest and search of the two individuals?

IV. Constitutional and Statutory Provisions

The State of Connecticut relies upon the following provisions of the Connecticut General Statutes:

Sec. 6-49. Arrest without warrant. Pursuit outside precincts. Sheriffs, deputy sheriffs, county detectives, constables, borough bailiffs, police officers, special protectors of fish and game and railroad and steamboat policemen, in their respective precincts, shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when such person is taken or

apprehended in the act or on the speedy information of others, and members of the state police department or of any local police department or county detectives shall arrest, without previous complaint and warrant, any person who such officer has reasonable grounds to believe has committed or is committing a felony. Members of any local police department, when in immediate pursuit of one who may be arrested under the provisions of this section, are authorized to pursue such offender outside of their respective precincts into any part of the state in order to effect the arrest. Such person may then be returned in the custody of such officer to the precinct in which the offense was committed. Any person so arrested shall be presented with reasonable promptness before proper authority.

Sec. 19-481. Penalty for illegal possession. Substitution of medical treatment for criminal sanctions. (a) Any person who possesses or has under his control any quantity of any narcotic substance, except as authorized in this chapter, for a first offense, may be imprisoned not more than seven years or be fined not more than three thousand dollars, or be both fined and imprisoned; and for a second offense, may be imprisoned not more than fifteen years, or be fined not more than five thousand dollars, or be both fined and imprisoned; and for any subsequent offense may be imprisoned not more than twenty-five years, or be fined not more than ten thousand dollars, or be both fined and imprisoned.

* * * * *

V. Statement of the Case

The defendant, Ralph Penland of Derby, Connecticut, was charged with the crimes of Possession of Heroin and Possession of Narcotics, Methadone. A Motion to Suppress Evidence was

filed by the defendant and after an evidentiary hearing, the motion was granted. Thereafter, a Motion to Dismiss the charges was granted and the State appealed to the Connecticut Supreme Court which rendered its opinion on January 3, 1978, upholding the trial court. The State's Motion to Reargue was denied by the Court on January 25, 1978.

VI. Statement of Facts

Shortly after 5:15 P.M. on November 30, 1974, Det. Thomas Hunt of the Naugatuck Police Department, an experienced narcotics investigator, received a telephone call from an informer. Det. Hunt claimed that this informant had supplied information in the past which led to two arrests and convictions involving narcotics.

The informant related to Hunt that at Tony's Bar on Burr Avenue in Naugatuck at 5:15 P.M. the informant saw "Tree" Babarik and Ralph Penland, both white males, sell two bags of heroin to another white male, that Penland handed the bags to the purchaser and Babarik took the money, that he overheard a conversation between Penland and Babarik in which he heard that they would be leaving the bar in a few minutes and would be operating a blue Dodge Dart automobile. The informant was familiar with the manner in which heroin was sold in small foil bags for money.

Detectives, including Hunt, then went to the bar within about five minutes after receiving the information and saw Penland and Babarik, whom they knew through previous narcotic investigations, leave the bar together. They were observed by the officers entering a four-door blue Dodge Dart.

Penland and Babarik were arrested for possession of narcotics as they were seated in the front seat of the vehicle. Within an

arm's reach of them, a search by the officers revealed narcotics paraphernalia used to shoot heroin, a syringe and bottle cap. In open view on the back seat was a bottle of methadone, another narcotic drug.

These facts were taken from the trial court's Finding. (See Appendix) Under Connecticut practice, the Finding is the binding conclusion of the trial court as to the facts. The trial court, as the trier of fact, has the power to determine what facts have been proven. *Cappiello v. Haselman*, 154 Conn. 490 (1967). Indeed, the *Connecticut Practice Book* states in part, "The finding shall set forth . . . all facts which the court finds proven . . .". Chapter 26, Section 619.

VII. Argument of Law

A. PROBABLE CAUSE WAS ESTABLISHED TO ARREST THE DEFENDANT AND SEARCH HIS AUTOMOBILE.

Aguilar v. Texas, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), requires that the following must be shown in order to establish "probable cause" from an informant's report: (1) the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were; and (2) the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

In this case the underlying circumstances from which the informant concluded that the narcotics were in the possession of Penland and Babarik were that the informant, who was familiar with narcotics transactions, personally observed Penland and Babarik in possession of a quantity of heroin, and he also personally observed them sell heroin to an unknown white male. It is submitted that no better "underlying circumstances" than the first hand personal observation of the informant could be shown.

As regards to the reliability of the information supplied to Detective Hunt by the informant, two aspects of the information were subsequently and quickly corroborated. That is, the informant told Det. Hunt that the two men would be leaving Tony's Restaurant shortly. When the officers arrived at the restaurant in about five minutes, they observed Penland and Babarik leaving together. The officers then observed the defendants walk across the street and both get into a four-door blue Dodge Dart, which, of course, corroborated the information that the pair was driving a Blue Dodge Dart.

Petitioner submits that the requirements of *Aguilar* were more than adequately met in the instant case. It is further submitted that the facts and circumstances within Det. Hunt's knowledge, including his knowledge of the defendants in his past narcotic investigations, and of which he had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or was being committed.

The validity of the arrest in this case is to be decided under Section 6-49 of the Connecticut General Statutes, which permits police officers to arrest without previous complaint and warrant any person the officer has "reasonable grounds" to believe has committed a felony. *State v. Wilson*, 153 Conn. 39, 41 (1965). In this connection "reasonable grounds" is to be equated with "probable cause". *Henry v. United States*, 361 U.S. 98, 4 L.Ed. 2d 134, 80 S. Ct. 168 (1959).

The trial judge and the Connecticut Supreme Court concluded that based upon the principles found in *Aguilar*, the credibility of the informant and his information was not established. The Connecticut Supreme Court opinion relied upon *Spinelli v.*

United States, 393 U.S. 410, 413, 21 L. Ed.2d 637, 89 S. Ct. 584 (1969) also to the effect that the innocent activities observed by the officer were insufficient to corroborate the information.

In *United States v. Harris*, 403 U.S. 573, 29 L. Ed 2d 723, 91 S.Ct. 2075 (1971), this court explained the principles underlying *Aguilar* and *Spinelli*. A majority of the court concluded that the affidavit in that case was sufficient to establish probable cause for the search. That affidavit did not include an averment that the informant had previously given correct information, and neither the name nor person of the informant was produced before the magistrate. This court concluded that the affidavit contained an "ample factual basis" for believing the informant, when considered with the affiant's own knowledge of the accused's past activities.

The officer in this case certainly had as much from which to arrive at probable cause as the magistrate in *Harris*. The informant was present and personally observed the heroin being very recently sold, the information given by the informant, i.e., as to the presence of the two defendants and their leaving the bar together and going to a particular car, was verified by the officer's own observation, *Draper v. United States*, 358 U.S. 307, 3 L.Ed. 2d 327, 79S. Ct. 329 (1959), *McCray v. Illinois*, 386 U.S. 300, 305, 18 L. Ed. 2d 62, 67, 87 S.Ct. 1056 (1967), as well as the officer's own knowledge of the defendants through prior narcotics investigation. *Harris v. United States*, supra, *Jones v. United States*, 362 U.S. 257, 271, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960).

Draper has never been overruled and since *Spinelli* has been modified, to say the least, by *Harris*, the petitioner submits that the present law as announced by this court appears to sustain the officer's actions in this case. In the interest of fairness to law enforcement agents seeking to follow the decisions of this Court, the Petitioner asks this Court to review the Connecticut Supreme Court decision.

B. THE COURT ACTED IMPROPERLY IN
SUPPRESSING THE SEIZED EVIDENCE
DISCOVERED DURING THE ARREST
AND SEARCH OF THE DEFENDANT.

The trial judge found the information from the informant incredible because the search turned up items other than packaged heroin and no money was seized from the defendants. This reasoning, not followed by the Connecticut Supreme Court, was obviously incorrect as the results of a search could not affect the existence of probable cause at the time of the arrest.

Cf. *Johnson v. United States*
333 U.S. 10, 17, 92 L.Ed. 436, 68 S.Ct. 367 (1948)

United States v. DiRe
332 U.S. 581, 595, 92 L.Ed. 210, 68 S.Ct. 222 (1948)

The trial judge, after filing a Memorandum of Decision which referred to a recital that the informant had given reliable information in the past, prepared a Finding of Fact for the State's appeal (Appendix, Page 4a) which found the officer received the call from "an alleged reliable informant" who "it is alleged" had in the past caused two narcotics convictions. The Finding, under Connecticut practice, controls.

Connecticut Practice Book, Section 619

The Connecticut Supreme Court translated that Finding into a conclusion that the officer thereby failed to convince the trial judge that the informant was credible and his information reliable.

It was not for the trial judge to decide, as a magistrate, whether the informant was credible or his information reliable; it was rather his obligation to decide if the officer, given the established

facts, had reasonable grounds to believe the informant and his information. *McCray v. Illinois*, supra, at 300, 305-6. The Petitioner submits the facts found by the trial judge as set forth in the Finding, as outlined in Part A, give rise to such reasonable grounds.

The Petitioner recognizes the preference for warrants expressed in *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965) but points out that in this case, the moment probable cause was established was the moment for the officers to act if they were to be effective, and that moment arrived when the defendant and his companion entered the particular motor vehicle.

The court has established a rule that illegally seized evidence may not be admitted in evidence against a criminal accused. That rule, the Petitioner submits, permits the kind of judicial reasoning illustrated by this case and has created division between lines of cases very narrowly decided by this Court, under which law enforcement agents operate in split second situations, sometimes to their peril, but always to the peril of an innocent society which is vitally concerned in law enforcement. It is difficult to see in this case, as in many, that the exclusionary rule has any reason then to reward the guilty for the mistakes, if they be such or are later called such, of the law enforcement agent.

A substantial and vital judicial controversy arising out of this Court's past decisions would be settled if this Court granted certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Petitioner, State of Connecticut

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APPENDIX

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SUPERIOR COURT,
JUDICIAL DISTRICT OF WATERBURY

NO. 12079,

STATE OF CONNECTICUT

v.

RALPH PENLAND

MEMORANDUM ON MOTIONS
TO SUPPRESS EVIDENCE

The defendant's have moved to suppress as evidence, heroin, controlled drugs and other items seized from them, on the ground that the automobile in which they were driver and passenger and their persons were illegally searched inasmuch as no search or arrest warrant had been obtained and there existed no probable cause for the search of the vehicle or the persons. Since the motions are the same in both cases, the memorandum will cover both defendants.

The facts as presented in the defendants' exhibit 1 indicate that three police officers received the following information from an informant: That at Tony's Bar on Rubber Avenue, Naugatuck, at 5:15 p.m., he saw one Tree Babarik and one Ralph Penland, both white males, sell two bags of heroin to another white male, that Penland handed the bags to the purchaser and Babarik took the money, that he overheard a conversation between Penland and Babarik in which he heard that they would be leaving the bar in a few minutes. The informant is described as follows: "... a known and reliable informant who has supplied information in the past" The detectives went to the area of the bar and stopped an automobile which Babarik was operating and arrested him and the passenger Penland for possession of heroin. A coincident search of the vehicle and the persons of Babarik and

Penland disclosed a set of works (needle, syringe, bottle cap, and cotton ball) under the dashboard, a bottle of methadone on the rear seat, four yellow football slips on the person of Babarik as well as a white paper with a football line on it and a yellow paper containing a football line.

It is the established law of this state that in order to make an arrest there must be probable cause of the commission of a crime. *State v. DelVecchio*, 149 Conn. 567, 574. The validity of the arrest is to be determined under § 6-49 of the General Statutes which permits members of organized local police departments to arrest without previous complaint and warrant any person who the officer has reasonable grounds to believe has committed a felony. *State v. Wilson*, 153 Conn. 39, 41. "In this connection 'reasonable grounds to believe' is to be equated with 'probable cause'. *Henry v. United States*, 361 U.S. 98, 100, 102" *State v. Wilson*, supra, 41. "As the latter term implies, we are dealing with probabilities, and our determination is to be reached by an application of the factual and practical considerations of everyday life on which reasonable and prudent men act. *Brinegar v. United States*, 338 U.S. 160, 175" *State v. Wilson*, supra, 41. Here the only information that a crime had been committed was the word of the informant. Reports furnished by paid police informants, recent arrestees or anonymous informants who supply information confidentially, usually for reasons other than that they are doing their duty as good citizens, require a test of their reliability through past experiences with him or through corroboration of the essential elements of his information. *People v. Hogan*, 80 Cal. Rptr. 28, 29; *People v. Lewis*, 240 Cal. App. 2d 546, 550.

In the instant case the only recital of the informant's reliability is that he was known and reliable, the latter a conclusion, and had given reliable information in the past. The underlying circumstances from which the officer concluded that the informant was

credible or his information reliable were not established. *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S.Ct. 1509. Certainly there is no corroboration of the informant's information of the possession of heroin or the sale thereof, prior to the arrest, or of the fact that the substance he saw change hands was in fact heroin. See *United States v. Colon*, 419 F. 2d 120; *United States v. Shipstead*, 433 F. 2d 368; *Jones v. United States*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S.Ct. 725. A record of previous reliability of an informer with respect to the type of crime at issue is indeed crucial where probable cause is bottomed solely on the informer's unverified report. *United States v. Manning*, 448 F. 2d 992, 998.

The sole information was that of an informer whose credibility and reliability were not established so that his information could be the basis of a finding of probable cause. Without probable cause for the arrests, the search incident thereto was illegal and therefore the evidence secured by that search may not be used by the state in the presentation of its case against these defendants.

The motions to suppress evidence are granted.

Levine, J.
July 2, 1976

SUPREME COURT OF THE
STATE OF CONNECTICUT

NO. 8332, State of Connecticut v. Ralph Penland

FINDING

FIRST: The following facts are found:

1. Detective Thomas Hunt of the Naugatuck police department is a narcotics undercover agent assigned to the Naugatuck Valley Regional Crime squad.
2. Detective Hunt had investigated numerous narcotic transactions which resulted in arrests in the past.
3. On November 30, 1974, Detective Hunt received a telephone call, a little after 5:15 p.m., from an alleged reliable informant.
4. It is alleged that this informant had in the past supplied information to Detective Hunt that led to two arrests and convictions, one for possession of narcotics and one for sale of narcotics.
5. The informant told Detective Hunt that the informant was present in Tony's Restaurant, a bar on Burr Avenue in Naugatuck, and had observed Ralph Penland and Robert Babarik in possession of a quantity of heroin and did personally observe him sell two bags of heroin to another man.
6. Penland handed the bags of heroin to a white male and Babarik received the money in return in the sight of the informant and the informant overheard a conversation between Penland and Babarik that they would be leaving the car in a few minutes.
7. The informant was familiar with the manner in which heroin was sold in small foil bags for sums of money.

8. The informant told Detective Hunt that he observed the sale by both Penland and Babarik about 5:15 p.m.
9. Detective Hunt called two other detectives and they went to the area of Tony's Restaurant.
10. The police report stated the caller observed Penland hand two bags of heroin to a white male and Babarik took money in return. The report further states the informant overheard a conversation between Penland and Babarik that they would be leaving the bar in a few minutes.
11. The informant also told Detective Hunt that Penland and Babarik were operating a blue Dodge Dart and that they would be leaving the area very shortly.
12. Detective Hunt and the other detectives arrived at the area of the bar within about five minutes after the telephone call and observed Penland and Babarik leaving Tony's Restaurant, together, one in back of the other.
13. Detective Hunt knew Penland and Babarik through previous investigations in narcotics.
14. Penland and Babarik were observed by Detective Hunt to cross the street, to then enter a four-door blue Dodge Dart.
15. At this point, Detective Hunt and the other officers pulled over to their vehicle and arrested both Penland and Babarik for possession of narcotics in the bar.
16. The vehicle was in operation in a driveway across the street from the bar when they stopped it. Detective Hunt had asked the informant if they had heroin after the sale.
17. The immediate area around Penland and Babarik was searched and narcotics paraphernalia used to shoot heroin, a syringe and bottle cap were found under the front dashboard of the vehicle.

18. At the time of the arrest, Penland and Babarik were seated in the front seat of the vehicle and were within arm's reach of the paraphernalia.

19. In open view on the back seat of the vehicle was a bottle of methadone.

20. This bottle contained a clear liquid and was labeled "methadone", prescribed for one David Smoker, 138 Howard Avenue, New Haven, Connecticut.

21. Detective Hunt recognized the bottle of methadone as contraband.

22. Detective Hunt later testified that he wasn't arresting them for a transaction that had transpired at Tony's Bar.

23. No packaged quantity of heroin was found on the persons of Babarik and Penland.

24. Penland was a passenger in the Babarik vehicle.

25. The officers arrived at the area of Tony's Restaurant about 5:30 p.m.

SECOND: The following conclusion of fact was reached:

26. The informant was incredible since the packaged heroin he said he saw on the defendant was not found after a search of his person nor was any money found on him which would result from the alleged narcotics deal the informant claimed to have seen.

THIRD: The following conclusions were reached.

27. There were no underlying circumstances from which the court could conclude that the informant was credible or his information reliable.

28. There was no corroboration of the informant's information of the possession of heroin or the sale thereof prior to the arrest, or of the fact that the substance he saw change hands was in fact heroin.

29. The arrests of Penland and Babarik were made without probable cause.

30. The search of the vehicle was illegal and the evidence secured by that search was suppressed.

FOURTH: The State made the following claim of law which the court overruled:

31. The arrest of Penland and Babarik was upon probable cause and the search of the vehicle and seizure of narcotic paraphernalia and contraband was legal.

FIFTH:

All exhibits are hereby made a part of the record on appeal and may be used in the Supreme Court without being printed.

Levine, J.

Filed March 22, 1977

CONNECTICUT SUPREME COURT

October Term, 1977

No. 8332

STATE OF CONNECTICUT V. RALPH PENLAND

HOUSE, C. J., LOISELLE, BOGDANSKI, LONGO and SPEZIALE, Js.

Argued October 19, 1977—decision released January 3, 1978

Information charging the defendant with the crimes of possession of heroin and possession of narcotics, brought to the Superior Court in the judicial district of Waterbury where the court, *Irving Levine, J.*, granted the defendant's motion to suppress evidence; on motion by the defendant, the court, *O'Brien, J.*, rendered judgment dismissing the action and discharging the defendant from custody, from which the state has appealed to this court. *No error.*

Walter H. Scanlon, assistant state's attorney, for the appellant (state).

Raymond J. Quinn, Jr., public defender, for the appellee (defendant).

SPEZIALE, J. The sole issue raised in this appeal by the state is whether the court erred in granting the defendant's motion to suppress certain evidence on grounds that the defendant's arrest and the search incident to that arrest were illegal.

Ralph Penland was charged with possession of narcotics, heroin General Statutes § 19-481 (a). The evidence of the crime was seized in a warrantless search of the automobile in which Penland was a passenger, after a warrantless arrest of Penland and his companion. After an evidentiary hearing on the defendant's motion to suppress the seized evidence, the motion was granted

(*Levine, J.*), and a subsequent motion to dismiss the case was also granted (*O'Brien, J.*), because the state conceded that the action could not be maintained without the evidence suppressed.

The crucial question here is whether there was probable cause for the arrest. It is an established rule that a properly conducted warrantless search incident to a lawful arrest is not illegal. *State v. Cobuzzi*, 161 Conn. 371, 373, 288 A.2d 439 (1971), cert. denied, 404 U.S. 1017, 92 S. Ct. 677, 30 L. Ed. 2d 664; *State v. Collins*, 150 Conn. 488, 492, 191 A.2d 253 (1963); 4 Wharton, Criminal Evidence § 725 (13th Ed.). In order for the search to be legal, however, the arrest itself must be valid. *State v. Cobuzzi*, supra, 375; 4 Wharton, loc. cit. Section 6-49 of the General Statutes authorizes a police officer to arrest, without a warrant, "any person who such officer has reasonable grounds to believe has committed or is committing a felony." "Reasonable grounds" is to be equated with probable cause. *State v. Cobuzzi*, supra, 376; *State v. Wilson*, 153 Conn. 39, 41, 212 A.2d 75 (1965). Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that an offense has been or is being committed. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). There is often a fine line between mere suspicion and probable cause, and "[t]hat line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances." *Brinegar v. United States*, supra, 176.

Whether there was probable cause for Penland's arrest can only be determined through scrutiny of the circumstances leading up to the arrest. Detective Hunt, the arresting officer, was the sole witness at the hearing on the motion to suppress. Although he

testified that he was acting on a tip from an informant, the informant was not named and did not appear. Thus, the credibility of Hunt was a crucial factor in evaluating the issue of probable cause.

The court found that on November 30, 1974, Hunt, an undercover narcotics agent, received a telephone call from "an alleged reliable informant." Hunt testified that the informant had in the past supplied him with information that resulted in two arrests and convictions. The informant told Hunt that he was present in Tony's Restaurant in Naugatuck and that he had observed Penland and one Robert Babarik in possession of a quantity of heroin, that he had seen them sell two bags of heroin to another man, and that he had overheard them say they would be leaving in a few minutes. The informant also told Hunt that Penland and Babarik were operating a blue Dodge Dart. Hunt called two other detectives and they went to the area of Tony's Restaurant. They arrived roughly five minutes after receiving the telephone call and observed Penland and Babarik leaving the bar together. Hunt knew Penland and Babarik through previous narcotics investigations. He saw them cross the street and enter a blue Dodge Dart. At this point Hunt and the other detectives pulled over to the defendant's vehicle and arrested both of them for possession of narcotics while in the bar. Then, the immediate area around Penland and Babarik was searched; narcotics paraphernalia were found under the front dashboard, within arm's reach of the men, and a bottle of methadone, which Hunt recognized as contraband, was in open view on the back seat. No packaged quantity of heroin was found on the persons of Babarik or Penland. Contradicting his prior testimony, Hunt later testified that he was not arresting them for a transaction that had transpired at Tony's Restaurant.

The court concluded that there were no underlying circumstances from which it could determine that the informant was credible or his information reliable. See *Spinelli v. United States*,

393, U.S. 410, 413, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). It further concluded that the arrests of Penland and Babarik were made without probable cause and that the search of the vehicle was therefore illegal, requiring suppression of the evidence secured by the search. See *Beck v. Ohio*, supra, 91.

The state contends that Hunt "could most reasonably conclude that the informant was credible because the informant had given information in the past that had led to two arrests and convictions for possession and sale of heroin." The simple answer is that the trial court did not accord any weight to Hunt's testimony as to the credibility or reliability of the informant. The trier of the facts determines with finality the credibility of witness and the weight to be accorded their testimony. "We cannot retry the facts or pass upon the credibility of the witnesses." *Johnson v. Flammia*, 169 Conn. 491, 497, 363 A.2d 1048 (1975).

To support the claim that there was probable cause for the arrest, there was only Hunt's testimony that the informant was reliable and Hunt's unsupported statements that he himself believed Penland and Babarik were in possession of narcotics. As noted, Hunt's credibility was a crucial factor in evaluating the issue of probable cause. A review of Hunt's testimony, as set forth in the appendix to the defendant's brief, reveals numerous contradictory statements. For example, Hunt initially testified that the arrest was made for possession of narcotics in the bar. He later stated that it was for possession of narcotics at the time of the arrest, and that he was not arresting them for a transaction that occurred in Tony's Restaurant. At the hearing, Hunt testified that Penland and Babarik were first seen when they were leaving the bar, yet the police report states that they were initially observed in the car. Although those may appear to be minor inconsistencies, when viewed in context they tend to undermine Hunt's assertion that he had probable cause for the arrest. For instance, the infor-

mant's tip described a transaction that took place in the bar. Yet Hunt testified that the arrest was not based on this transaction. He asserted that the arrest was for possession of narcotics *after* the defendants left the bar, but he was unable to give any clear reasons for believing that they were in possession of narcotics *at that time*, except that it was a reasonable inference to be drawn from the tip regarding the transaction in the bar. Further, it is curious that although he stated that he believed Babarik and Penland were in possession of narcotics when he saw them leaving the bar, he waited until they had crossed the street and entered their car before making the arrest.

The court was assured by Hunt that his informant was reliable; however, the court found that Hunt received a telephone call from "an *alleged* reliable informant." (Emphasis added.) It further found: "It is *alleged* that this informant had in the past supplied information to Detective Hunt that led to two arrests and convictions, one for possession of narcotics and one for sale of narcotics." (Emphasis added.) The only underlying circumstances corroborating the informant's information were that Penland and Babarik left the bar shortly after the call was made and that they were driving a blue Dodge Dart, both apparently innocent activities. See *Spinelli v. United States*, supra, 414. As noted, Hunt clearly failed to convince the court that his information was credible or his information reliable. Hunt *himself* saw nothing which would support a belief that the defendants were in possession of narcotics. Therefore, we hold that the court did not err in concluding that the arrest was made without probable cause and that the search was illegal. The evidence was properly suppressed.

There is no error.

In this opinion the other judges concurred.

Supreme Court, U.S.

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October Term, 1977

NO. 77-1348

THE STATE OF CONNECTICUT,
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BRIEF IN OPPOSITION TO ISSUANCE
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COURT OF THE STATE OF CONNECTICUT

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STATE v. PENLAND

IN THE
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October Term, 1977

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Respondent

BRIEF IN OPPOSITION TO ISSUANCE
OF WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF CONNECTICUT

The respondent, Ralph Penland, respectfully opposes the issuance of a Writ of Certiorari to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on January 3, 1978.

I. CITATION and OPINION

A decision of the Connecticut Supreme Court, State v. Ralph Penland, Vol. XXXIX, No. 27, Conn. L.J. p. 3 (January 3, 1978), which appears below. Said decision is reported as State v. Penland, Conn. _____, A.2d _____ (1978).

CONNECTICUT SUPREME COURT

October Term, 1977

No. 8332

State of Connecticut v. Ralph Penland

House, C.J., Loiselle, Bogdanski,
Longo and Speziale, Js.Argued October 19, 1977--decision
released January 3, 1978

Information charging the defendant with the crimes of possession of heroin and possession of narcotics, brought to the Superior Court in the judicial district of Waterbury where the court, Irving Levine, J., granted the defendant's motion to suppress evidence; on motion by the defendant, the Court, O'Brien, J., rendered judgment dismissing the action and discharging the defendant from custody, from which the state has appealed to this court. No error.

Walter H. Scanlon, assistant state's
attorney, for the appellant (state).

Raymond J. Quinn, Jr., public defender,
for the appellee (defendant).

SPEZIALE, J. The sole issue raised in this appeal by the state is whether the court erred in granting the defendant's motion to suppress certain evidence on grounds that the defendant's arrest and the search incident to that arrest were illegal.

Ralph Penland was charged with possession of narcotics, heroin General Statutes Sec. 19-481 (a). The evidence of the crime was seized in a warrantless search of the automobile in which Penland was a passenger, after a warrantless arrest of Penland and his companion. After an evidentiary hearing on the defendant's motion to suppress the seized evidence, the motion was granted (Levine, J.), and a subsequent motion to dismiss the case was also granted (O'Brien, J.), because the state conceded that the action could not be maintained without the evidence suppressed.

The crucial question here is whether there was probable cause for the arrest. It is an established rule that a properly conducted warrantless search incident to a lawful arrest is not illegal. State v. Cobuzzi, 161 Conn. 371, 373, 288 A.2d 439 (1971), cert. denied, 404 U.S. 1017, 92 S. Ct. 677, 30 L.Ed. 2d 664; State v. Collins, 150 Conn. 488, 492, 191 A.2d 253 (1963); 4 Wharton Criminal Evidence Sec. 725 (13th Ed.). In order for the search to be legal, however, the arrest itself must be valid. State v. Cobuzzi, supra, 375; 4 Wharton, loc. cit. Section 6-49 of the General Statutes authorizes a police officer to arrest, without a warrant, "any person who such officer has reasonable grounds to believe has committed or is committing a felony." "Reasonable grounds" is to be equated with probable cause. State v. Cobuzzi, supra, 376; State v.

Wilson, 153 Conn. 39, 41, 212 A.2d 75 (1965). Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that an offense has been or is being committed. Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L. Ed.2d 142 (1964); Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 93 L.Ed. 1879, (1949). There is often a fine line between mere suspicion and probable cause, and "that line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances." Brinegar v. United States, supra, 176.

Whether there was probable cause for Penland's arrest can only be determined through scrutiny of the circumstances leading up to the arrest. Detective Hunt, the arresting officer, was the sole witness at the hearing on the motion to suppress. Although he testified that he was acting on a tip from an informant, the informant was not named and did not appear. Thus, the credibility of Hunt was a crucial factor in evaluating the issue of probable cause.

The court found that on November 30, 1974, Hunt, an undercover narcotics agent, received a telephone call from "an alleged reliable informant." Hunt testified that the informant had in the past supplied him with information that resulted in two arrests and convictions. The informant told Hunt that he was present in Tony's Restaurant in Naugatuck and that he had observed Penland and one Robert Babarik in possession of a quantity of heroin, that he had seen them sell two bags of heroin to another man, and that he had overheard them say they would be leaving in a few minutes. The informant also told Hunt

that Penland and Babarik were operating a blue Dodge Dart. Hunt called two other detectives and they went to the area of Tony's Restaurant. They arrived roughly five minutes after receiving the telephone call and observed Penland and Babarik leaving the bar together. Hunt knew Penland and Babarik through previous narcotics investigations. He saw them cross the street and enter a blue Dodge Dart. At this point Hunt and the other detectives pulled over to the defendant's vehicle and arrested both of them for possession of narcotics while in the bar. Then, the immediate area around Penland and Babarik was searched; narcotics paraphernalia were found under the front dashboard, within arm's reach of the men, and a bottle of methadone, which Hunt recognized as contraband, was in open view on the back seat. No packaged quantity of heroin was found on the persons of Babarik or Penland. Contradicting his prior testimony, Hunt later testified that he was not arresting them for a transaction that had transpired at Tony's Restaurant.

The court concluded that there were no underlying circumstances from which it could determine that the informant was credible or his information reliable. See Spinelli v. United States, 393, U.S. 410, 413, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964). It further concluded that the arrests of Penland and Babarik were made without probable cause and that the search of the vehicle was therefore illegal, requiring suppression of the evidence secured by the search. See Beck v. Ohio, supra, 91.

The state contends that Hunt "could most reasonably conclude that the informant was credible because the informant had given information in the past that had led to two arrests

and convictions for possession and sale of heroin." The simple answer is that the trial court did not accord any weight to Hunt's testimony as to the credibility or reliability of the informant. The trier of the facts determines with finality the credibility of witness and the weight to be accorded their testimony. "We cannot retry the facts or pass upon the credibility of the witnesses." Johnson v. Flammia, 169 Conn. 491, 497, 363 A.2d 1048 (1975).

To support the claim that there was probable cause for the arrest, there was only Hunt's testimony that the informant was reliable and Hunt's unsupported statements that he himself believed Penland and Babarik were in possession of narcotics. As noted, Hunt's credibility was a crucial factor in evaluating the issue or probable cause. A review of Hunt's testimony, as set forth in the appendix to the defendant's brief, reveals numerous contradictory statements. For example, Hunt initially testified that the arrest was made for possession of narcotics at the bar. He later stated that it was for possession of narcotics at the time of the arrest, and that he was not arresting them for a transaction that occurred in Tony's Restaurant. At the hearing, Hunt testified that Penland and Babarik were first seen when they were leaving the bar, yet the police report states that they were initially observed in the car. Although those may appear to be minor inconsistencies, when viewed in context they tend to undermine Hunt's assertion that he had probable cause for the arrest. For instance, the informant's tip described a transaction that took place in the bar. Yet Hunt testified that the arrest was not based on this transaction. He asserted that the arrest was for possession of narcotics after the defendants left the bar, but he was unable to give any clear reasons for believing that

they were in possession of narcotics at that time, except that it was a reasonable inference to be drawn from the tip regarding the transaction in the bar. Further, it is curious that although he stated that he believed Babarik and Penland were in possession of narcotics when he saw them leaving the bar, he waited until they had crossed the street and entered their car before making the arrest.

The court was assured by Hunt that his informant was reliable; however, the court found that Hunt received a telephone call from "an alleged reliable informant." (Emphasis added.) It further found: "It is alleged that this informant had in the past supplied information to Detective Hunt that led to two arrests and convictions, one for possession of narcotics and one for sale of narcotics." (Emphasis added.) The only underlying circumstances corroborating the informant's information were that Penland and Babarik left the bar shortly after the call was made and that they were driving a blue Dodge Dart, both apparently innocent activities. See Spinelli v. United States, supra, 414. As noted, Hunt clearly failed to convince the court that his information was credible or his information reliable. Hunt himself saw nothing which would support a belief that the defendants were in possession of narcotics. Therefore, we hold that the court did not err in concluding that the arrest was made without probable cause and that the search was illegal. The evidence was properly suppressed.

There is no error.

In this opinion the other judges concurred.

II. ISSUE

1. Did the Supreme Court of Connecticut err in concluding that the arrest made was without probable cause and that the search was illegal and that the evidence was properly suppressed?

III. STATEMENT OF FACTS

Detective Thomas Hunt of the Naugatuck Police Department is a narcotics undercover agent assigned to the Naugatuck Valley Regional Crime Squad. (T-4) He had worked as an undercover agent in narcotics and had investigated cases concerned with narcotic traffic for five years. (T-4)

Detective Hunt testified that on November 30, 1974, he received a telephone call a little after 5:00 from a reliable informant. (T-5) Detective Hunt testified that the caller had in the past supplied information that led to two arrests and convictions, one for possession of narcotics and one for sale of narcotics. (T-5, 6 T-18).

Hunt further testified that the informant told him that he was present in Tony's Restaurant, a bar on Burr Avenue (sic) in Naugatuck and had observed Ralph Penland and Robert Babarik in possession of a quantity of heroin and did personally observe him (sic) sell two bags of heroin to another man. (T-6, 19).

Detective Hunt testified that the informant told him the pair were operating a blue Dodge Dart and they would be leaving the area very shortly. (T-6)

Detective Hunt had known both Penland and Babarik through previous investigations and had met them. (T-7, 8).

Detective Hunt went to the area of Tony's Restaurant with two other detectives, Clisham and Long. (T-6) The three detectives arrived at the area of Tony's Restaurant approximately five minutes after receiving said information. (T-7) Hunt observed Penland and Babarik leaving Tony's Restaurant. (T-7, 8). Hunt observed the pair cross the street to Babarik's vehicle. (T-9)

At this point, Detective Hunt and the other officers pulled their vehicle over and stopped the blue Dodge Dart. Detective Hunt got out of the vehicle and placed them both under arrest for possession of narcotics in the bar. (T-10, 11, 21) Detective Hunt guessed or thought the accused had narcotics in their possession. (T-22) In subsequent testimony, Hunt stated the informant told him the accused had more narcotics. (T-29)

After placing the accused under arrest, Detective Hunt searched the immediate area of the car around the defendants. (T-12) Found underneath the dashboard in Babarik's car, by Detective Hunt, was a set of works which consisted of a syringe and bottle cap. (T-12) At the time of the arrest, Penland and Babarik were seated in the front seat of the vehicle and were within arm's reach of the paraphernalia. (T-13)

In open view on the back seat of Babarik's vehicle was a bottle of methadone prescribed for one David Smoker, 138 Howard Avenue, New Haven. (T-27, 38, Def. Exh. 1)

No testimony was given by the sole witness, Detective Hunt, of the presence of heroin or residuals thereof in the set of works found under the dashboard of Babarik's vehicle. (T-1 through 67, Def. Exh. 1)

Detective Hunt recognized the bottle of methadone as contraband. (T-36)

Detective Hunt on cross-examination testified he wasn't arresting the defendants for a transaction that had transpired at Tony's Bar. (T-35)

No packaged quantity of heroin was found on the persons of Penland or Babarik. (T-26)

IV. PROCEEDINGS TO DATE

Upon the information of Joseph A. Hill, Esq., Assistant State's Attorney for the Judicial District of Waterbury, charging Ralph Penland of Derby with the crime of possession of heroin and the crime of possession of narcotics, methadone, the defendant appeared and duly moved to suppress as evidence all items taken from the vehicle in which he was a passenger on November 30, 1974.

A Motion to Suppress was filed on March 17, 1976, the defendant claiming that "the automobile in which the defendant was a passenger and his person were illegally searched in contravention of the Constitution of the State of Connecticut, Article I, Sections 7, 8 and 9 and the Constitution of the United States, Amendments 4 and 6, in violation of Sec. 54-33 of the General Statutes of the State of Connecticut, in that

- a. The property was seized without a warrant;

- b. There was not probable cause to permit the search of the vehicle or persons of the defendant.

The Honorable Irving Levine granted said motion on July 2, 1976. Thereafter a motion to dismiss was filed under the provisions of Sec. 54-56 submitting that there was not sufficient evidence of cause to justify the continuing of such information. On July 20, 1976, Judge O'Brien granted the State the right to appeal.

The Connecticut Supreme Court, on January 30, 1978, concluded that the arrest was made without probable cause and that the search was illegal. The evidence was properly suppressed.

V. ARGUMENT

I.

The State in its brief asserts that the officer, i.e. Detective Thomas Hunt, could have searched the defendant's (sic) car on one of two grounds; viz, as incident to the arrest or by the establishment of probable cause for the search of the automobile. (State's Brief, p. 6)

It is undisputed that the defendant, Ralph Penland, was placed under arrest prior to the search of the vehicle and search of his person. (T-10) It is the defendant's submission that the arrest was a pretext to justify the search of the vehicle and the persons of Penland and Babarik.

A. THE ARREST

Giving full credit to Detective Hunt's testimony, he received a call from a reliable informant that he, the informant, had witnessed a sale of heroin involving Babarik and Penland. Shortly thereafter, Detective Hunt proceeded to the area, approached the vehicle in which Penland was riding and placed the occupants under arrest for possession of heroin. (T-5-10; App. pp. 2a-5a) There is no claim that any heroin was in open view in the vehicle. There was no assertion that the officer had probable cause to conduct a search in an effort to effect a later arrest. (T-9, 10; App. p. 5a)

What was the crime committed antecedent to the search? The officer originally testified

it was possession of narcotics. (T-10; App. p. 5a) If the arrest was predicated on an alleged sale in the bar, it would logically follow that the arrest would have been for possession and sale of heroin in keeping with the information supplied by the informant. The arrest could not have been predicated on the fruits of the search since the accused were in custody before it was conducted. (T-12, App. pp. 5a, 6a)

We have Detective Hunt's testimony that the arrest was not for a transaction that had transpired at Tony's Bar. (T-21; App. p. 9a) He testified that the arrest "was based upon my probable cause that to his belief that they were in possession of narcotics." (T-21; App. p. 10a)

Detective Hunt disavowed any claim that the probable cause to arrest for possession and sale of heroin in the bar was the basis for the arrest for possession of narcotics. (T-21; App. pp. 9a, 10a) The police report, (Def. Exh. 1), indicates that the fruits of the illegal search alone were the basis of the charges of possession of heroin and possession of controlled drugs against Penland and the charges of possession of heroin, possession of controlled drugs and professional gambling against Babarik. (Def. Exh. 1, App. 1a)

The State claims that two elements standing alone are sufficient to justify a warrantless arrest and a search incident to the arrest:

- (1) A report by an informant that he witnessed the commission of a crime.
- (2) Established reliability of the informant based on past information which had led to arrest and conviction.

tions.

It is our position here that if in fact they had received information that a transaction had occurred in Tony's Bar that at that point they had two options. First of all, they could have brought in the informant or the person from whom the information came, taken a statement from him as to having been an eyewitness to an illegal transaction and sought from a Magistrate a warrant for the arrest of the two individuals who they charged committed these offenses.

Secondly, an option was to keep these men under surveillance to see what, if any criminal misconduct, they might involve themselves in. Rather than do that, they proceeded and speculated that they might find contraband in the vehicle or on the persons of the occupants.

Detective Hunt testified he observed Penland and Babarik leaving the bar and cross the street to the vehicle which was parked in the parking lot. (T-7, 8; App. p. 4a) If probable cause then existed to arrest them, the officer certainly would have arrested them before they entered Babarik's stationary vehicle.

B. CREDIBILITY OF DETECTIVE HUNT

Detective Thomas Hunt was the sole witness in the hearing on a Motion to Suppress. The evidence of any crime giving rise to the warrantless arrest came from an anonymous informant. In considering hearsay evidence, the Court had the duty to determine the credibility or lack of credibility of the witness and the informant whose absence precluded the defendant's right to cross-examination.

Detective Hunt's testimony was rampant with contradictions. He initially testified that the arrest was made for a crime committed at Tony's Bar. He later testified that he wasn't arresting them for a transaction that had transpired at the bar. (T-10, 21; App. pp. 5a, 9a) He initially testified that he guessed or then thought that the defendants had heroin in the vehicle or on their persons. (T-22; App. p 10a)

He later testified that the informant told him that they had a quantity of heroin remaining after the sale in the bar. (T-22, 29; App. pp. 10a, 14a) In Defendant's Exhibit I, the police report, one looks in vain for any reference to a continuing felony. (T-34, Def. Exh I; App. p. 1a)

Detective Hunt further testified that on arrival in the area of Tony's Bar he observed Penland and Babarik leaving the bar and crossing the street to their vehicle which was parked in the parking lot. (T-8; App. p. 4a) This was in direct conflict with his police report. (Def. Exh. I), in which he states that when first observed, Babarik was operating a 1964 4-door sedan in the parking lot across the street from Tony's Bar. (Def. Exh. I; App. p. 1a)

With this background, the reported statements of the informant required special scrutiny. The conclusion of fact arrived at by Judge Levine that "the informant was incredible since the packaged heroin he said he saw on the defendant was not found after a search of his person nor was any money found on him which would result from the alleged narcotics deal the informant claimed to have seen" was fully justified by the evidence adduced at the hearing.

It is a captious argument to say "that the Court's factual grounds were infirm in that nowhere in the evidence is it suggested that no money was found on the defendants. The evidence merely indicates that no money was seized from the defendants, not that no money was found." (State's Brief, p. 11, 12)

Detective Hunt testified that after the arrest, not one but two searches of the person were conducted. One search at the scene and one at the station house, involving patting down and emptying of pockets. (T-26; App. pp. 11a, 12a) Indeed the police report would indicate that rather than a patting down at the site of the arrest, a search of Babarik's person disclosed four yellow football slips and one piece of paper with a football line on it and one yellow piece of cardboard with a football line on the back of it.

Whether in fact Detective Hunt was truthful in his testimony that he had been told by an anonymous informant of a sale by the defendants to an anonymous buyer in Tony's Bar could only be determined by taking into account the absence of heroin and money at the time the arrest and search was made of the vehicle and persons of Babarik and Penland. (T-31, 42; App. pp. 16a, 21a, 22a)

II. THE LAW

There were no underlying circumstances from which the Court could conclude that the informant was credible or his information reliable.

"The facts necessary to uphold an arrest without a warrant must be sufficiently strong to support the issuance of a warrant for arrest. In no case may an arrest or a warrant for arrest be based upon opinion or suspicion of some person unsupported by personal knowledge of facts. United States ex rel., King v. Gokey, supra; and in no case may a warrant to search a private home rest upon mere affirmance of suspicion or belief without disclosure of supporting facts and circumstances." Nathanson v. United States, 290 U.S. 41, 47, 54 S.Ct. 11, 78 L.Ed. 159.

Supportive circumstances corroborating the hearsay are a necessary complement to the affiant's evidence of reliability of the informer.

"An arrest may not be used as a pretext to search for evidence." United States v. Lefkowitz, 1932, 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L.Ed. 877. To put it in other words, the search must be incident to the arrest, and not vice versa." Taglavore v. United States, 291, F.2d. 262, 265.

The Supreme Court in Spinelli v. United States, 393 U.S. 410, expounded on the basis for its decision invalidating the affidavit in Aguilar v. Texas, 378, U.S. 108, as follows:

"While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, this Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was "'credible' or his information 'reliable.'" Spinelli v. United States, supra, at 641, 642.

In the instant case, reliability would appear to be satisfied if the testimony of Detective Hunt were given credence. The first element, underlying circumstances, is totally lacking.

Testimony of having met the defendants in connection with prior narcotic investigations is equally unavailing.

"Finally the allegation that Spinelli was "known" to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision. Nathanson v. United States, 290 U.S. 41, 46.

78 L.Ed. 159, 161, 54 S.Ct. 11
(1933)."

Spinelli v. United States,
393 U.S. 410

The State claims that the officers (sic) could have searched the defendant's (sic) car on one of two grounds; viz, as incident to the arrest by virtue of Sec. 6-49, or by establishment of probable cause for the search of the automobile. It is not what the officer could have done, but what in fact was done. The officer elected to proceed under Sec. 6-49 and the legality of the arrest is the only prop which could justify the search that followed. The arrest was illegal. There is no fallback position.

There is no suggestion that the defendant and his companion would have been taken to headquarters but for the officers' observation of the contents of the bag. Especially in view of this fact, the search of the bag obviously was not incidental to any arrest; on the contrary, the sight and the examination of the contents of the bag were a cause of the arrest. This being so, the search and seizure would be, prima facie at least, unlawful. See Johnson v. United States, 333 U.S. 10, 16, 68 S. Ct. 367, 92 L.Ed. 436; State v. Reynolds, 101 Conn. 224, 229, 125A.636."

State v. Collins, 150 Conn.
488, 493.

VI. CONCLUSION

It is submitted that the Motion to Suppress and Dismiss were properly granted. The arrest of the defendants was illegal as was the search incident thereto. Claims that law enforcement personnel should be granted special privileges in dispensing with rights of citizens come afoul of the constitutional guarantees that are the birthright of every citizen. That the protection afforded by these constitutional guarantees might result in the discharge of guilty individuals in no way justifies the destruction of these rights. In this connection, it is worthwhile to quote the words of Mr. Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485, where he states:

"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that the administration of the criminal law the end justified the means--to declare that the Government may commit crimes in order to secure

the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

State v. Cuellar, 25 Conn.
Sup. 229.

As the Supreme Court of Connecticut has pointed out, the issue in this case was the credibility of Detective Hunt, the witness presented by the State. The trial court did not accord any weight to Hunt's testimony as to the credibility or reliability of the informant. The trier of the facts determines with finality the credibility of witnesses and the weight to be accorded their testimony.

It is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respondent, Ralph Penland

By: Raymond J. Quinn, Jr.

Raymond J. Quinn, Jr.
Public Defender
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P. O. Box 1245

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-1348

THE STATE OF CONNECTICUT,
Petitioner
vs.
RALPH PENLAND,
Respondent

APPENDIX

DEFENDANT'S EXHIBIT I

That on November 30, 1974 the above detectives received information from a known and reliable informant who has supplied information in the past whom stated to said detectives that at approximately 5:15 P.M. he (informant) was in Tony's Bar located on Rubber Ave., Naugatuck at the aforementioned time and that while there he personally observed a one Tree Babarik, a white male and a one Ralph Penland also a white male sell two bags of heroin to another white male inside of said bar. That he (informant) further stated that Penland handed the two bags of heroin to the white male and that Babarik took the money in return and that he personally overheard a conversation between Babarik and Penland. That Babarik stated to Penland that they would be leaving said bar in a few minutes.

That at approximately 5:30 P.M., the above detectives went to the area of Tony's Bar on Rubber Ave. looking for Babarik and Penland. That at this time Babarik who is known by Detective Hunt was observed operating a 1964 4-door sedan, color blue, Dodge Dart Ct. registration LN-2941 in the parking lot across the street from Tony's Bar on Rubber Ave. That at this time we stopped said vehicle and arrested the operator and his passenger Ralph Penland for possession of heroin. That a subsequent search of said vehicle and persons of Babarik and Penland revealed a set of works (needle, syringe, bottle cap and cotton ball) found under dash of said vehicle by Det. Hunt. Also found on the back seat was a bottle of a clear white liquid with methadone written on it, prescribed to a one David Smoker, 138 Howard Avenue, New Haven, Conn. That found on the person of Babarik was four (4) yellow football slips and one piece of white paper with a football line on it and one yellow piece of cardboard with a football line on the back side of it. That the subjects were transported to the

Naugatuck Police Department and booked for the following charges. Babarik poss. of Heroin-Poss. of Controlled Drugs, and Professional Gambling. Penland-Poss. of Heroin-Poss. of Controlled Drugs. Court date for both was set for 12-2-74 and the Bail Commissioner set bail at \$5000.00 each. Babarik's motor vehicle which was blocking the entrance to said parking lot was towed by Buddy's Garage located on Prospect St., Naugatuck.

THOMAS HUNT, having been called as a witness in behalf of the State, having been duly sworn, was examined and testified as follows:

(T-4) DIRECT EXAMINATION

BY MR. HILL

(T-5) Q Detective Hunt, bringing your attention to November 30, 1974, can you tell the Court what took place concerning a one Ralph Penland and a one Robert Babarik?

A Yes, sir. On that date at approximately a little after 5:00 I received a telephone call from a known and reliable informant.

Q Now, why do you say that you received a call from a known and reliable informant? What is your basis for that?

A He supplied information in the past leading to arrests and convictions.

Q That led to arrests and convictions?

A Yes, sir.

Q And approximately how many?

A Two.

(T-6) Q Two. When you received this call from an informant, what did the informant tell you, if anything?

A He told me he was present in a bar located on Burr Avenue in Naugatuck.

Q Did he name the bar?

A Tony's Restaurant.

Q Tony's Restaurant. And what else did he tell you?

A He personally observed one Ralph Penland and Robert Babarik in possession of a quantity of heroin and he also personally observed him sell heroin to an unknown white male.

Q To another?

A White male.

Q White male. Approximately what time, if you remember, did you receive this call?

A A little after 5:00, somewhere around ten, fifteen minutes after five.

Q Once you received this call, what did you do?

A I notified Detective Clisham and Long and we left the Police Station, went to the are of Tony's Restaurant.

Q Did he tell you anything else about what he saw at the restaurant, the informant?

A Yes. That they were operating a blue Dodge Dart and they'd be leaving the area very shortly.

(T-7) Q And where did the three of you go, if anywhere?

A We went to the area of the bar on Rubber Avenue.

Q And, approximately how long did it take you to arrive in that area?

A Approximately five minutes.

Q What did you observe?

A At that point there I observed Penland and Babarik leaving the bar, leaving the bar.

Q Leaving the bar?

A Yes, sir.

(T-8) Q Now, you observed both Penland and Babarik leave this area?

A Yes, sir.

Q And what bar was it?

A Tony's Restaurant.

Q Was that the same restaurant that was cited to you by the informant?

A Yes, sir.

Q Now, when you observed them leave the bar, what else did they do?

A They went across the street to their vehicle which was parked in the parking lot.

(T-9) Q And at this point what did you do?

Objection and Argument.....

(T-10) A At this point there we pulled our vehicle over to stop their vehicle. I got out of the vehicle and I placed them both under arrest for possession.

Q Right. Was this the same--

THE COURT: Placed them under arrest for what?

THE WITNESS: Possession of narcotics.

Q Was this the same vehicle that was described to you by the informant?

A Yes, sir.

Q And, you pulled the vehicle over and placed the occupants under arrest?

A Yes, sir.

BY MR. HILL:

(T-11) Q You placed both Babarik and Penland under arrest, is that correct?

(T-12) A Yes, sir.

Q And, were Detectives Clisham and Long with you at this time?

A Yes, sir. Detective Clisham was on the passenger's side of the vehicle

and Detective Long was in back of me.

Q When you placed Babarik and Penland under arrest, I assume they were still in their vehicle, is that correct?

A Yes, sir.

Q And, what did you do when you placed them under arrest?

A I searched the immediate area around them for my own protection, sir.

Q And, on effecting this search, did you find anything?

A Yes, sir. I found under the dash a set of works.

Q A set of works? Would you describe that, please?

A That is narcotics paraphernalia used to shoot heroin, a syringe, a bottle cap.

Q A syringe and bottle cap?

A Yes, sir.

Q And where in fact did you find these?

A Under the dashboard of the vehicle.

Q Under the dashboard of the vehicle?

A Yes, sir.

DETECTIVE THOMAS HUNT--CROSS-EXAMINATION

BY MR. QUINN:

(T-18) Q I want to cut through the chapter. Officer Hunt, you got a call from somebody who said there was a transaction that took place in Tony's Bar?

A A known reliable informant.

(T-19) Q Known and reliable informant?

A Yes, sir.

Q And he told you that somebody had sold two bags of heroin?

A And personally observed it, right.

Q He personally observed a transaction take place?

A Yes, sir.

Q And, after you received that information you proceeded over in the vicinity of Tony's Bar?

A Yes, sir.

Q You walked up to a car, is that right?

A We drove by the Bar so I observed Ralph Penland and Babarik leave the restaurant.

Q You saw them leave, you went up to the car and said you were under arrest?

A Yes.

Q What were they under arrest for?

A Possession of heroin, sir, possession of narcotics.

Q Possession of narcotics?

A Yes, sir.

Q How did you know they had any narcotics?

A I based--

MR. HILL: Objection, your Honor.

MR. QUINN: Oh, if your Honor please, may--

(T-20) THE COURT: I want to hear what the basis of the objection is. He is entitled to do that at least, before I overrule him.

MR. HILL: Your Honor, it is irrelevant to whether or not this officer knew in fact that these people had narcotics. All we are dealing with is probable cause that probably these people were in possession of narcotics, not whether or not he knew and that is irrelevant.

THE COURT: Yes. Now it would be important as to whether or not there was probable cause that they had narcotics on them at the time or did he have probable cause for their possession of narcotics at the time of the sale at the bar? Which is it?

MR. HILL: Either one, your Honor. The question is still irrelevant.

THE COURT: Why is it irrelevant, Mr. Hill?

MR. HILL: Whether or not this officer knew for a fact at that time that these people were in possession of narcotics is irrelevant to a question of probable cause.

THE COURT: Your claim is that so long as he believed, that is sufficient?

(T-21) MR. HILL: That is correct?

THE COURT: Overruled.

MR. HILL: Exception, your Honor.

THE COURT: Exception.

Would you read the last question.

(The last question was read by the Reporter.)

A Based upon probable cause provided by my informant, sir.

THE COURT: So that the arrest was for the possession of narcotics in the bar?

THE WITNESS: Yes, sir.

Q You were--it is your testimony here, Officer, that you were arresting Babarik and Penland for something that happened in Tony's Bar, a transaction?

A No, sir.

Q It was not?

A It was based upon my probable cause that, to believe that they were in possession of narcotics.

THE COURT: At what point were they in possession?

THE WITNESS: When I saw them, sir.

THE COURT: You thought they had them on them when you saw them?

THE WITNESS: Yes, sir.

(T-22) THE COURT: That's when you made the arrest.

BY MR. QUINN:

Q Am I correct that you assumed that if a transaction had taken place at Tony's Bar they had some left-overs that might be on their person?

A Yes, sir.

Q Is that guess work involved here?

A Yes, sir.

MR. HILL: Objection, your Honor, to that term, "guessing".

MR. QUINN: I claim the term.

THE COURT: It's a lawyer's statement. I'll allow it to stand.

Q Now, you went up--

THE COURT: You can ask him if it was an inference.

Q This informant told you he saw a transaction, isn't that right?

A He saw them in possession of narcotics.

Q He told you something about two bags of heroin being sold?

A He observed a sale but he also stated that they were in possession of narcotics.

BY MR. QUINN:

(T-25) Q Did you--you said you walked up to the car and you had the two, the other two officers with you?

A Yes, sir.

Q You said to the two occupants of the car who were in the front seat, you are under arrest?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q And you were arresting them because you suspected that they might have some heroin on them?

(T-26) A I believe I had probable cause, I believe they had probable cause on--

Q You keep using the words probable cause?

A Yes, sir.

Q And that probable cause was that a

person or an informant had told you he saw a transaction?

A Yes, sir.

Q He saw them in possession of heroin?

A Yes, sir.

Q You said you are under arrest and you searched the two men, is that right?

A I patted the two men down, sir.

Q You patted them down?

A Yes, sir.

Q Did you ask them to take what was in their pockets out?

A At the station house we did sir.

Q You did that later?

A Yes, sir.

Q Well, in any event, after patting them down and after searching them at the station, did you find anything on the person of Ralph Penland?

A Anything, sir?

(T-27) Q Anything, drugs or narcotics?

A No, sir.

Q You found nothing. Now, you then searched the vehicle, is that correct?

A Just the immediate area of their person for weapons.

Q I am going to ask you if you can answer the question. Did you search the car?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q And you took that set of works into your possession?

A Yes, sir.

Q Now, when you received the information that a transaction had taken place at Tony's Bar, did you do anything about getting a search warrant for the vehicle that had been described to you?

A No, sir.

Q You did not. Did you do anything about getting an arrest warrant predicated on what this man had told you about a transaction?

A No, sir.

Q Did you at that point talk to this informer and find out who was there when the transaction occurred or anything of that effect?

A Other than Mr. Penland and Babarik, sir?

Q Other than Penland and Babarik.

A. No, sir.

Q You did not. So that it is accurate to say that you received information that a crime, in your view, had been committed and concluded, is that right?

(T-29) A The crime was still being--they are in possession of narcotics.

Q You assumed?

A They were still in possession.

Q This was a tag end to it, is that right?

A I assumed they were still in possession of narcotics, sir.

Q You had no basis for knowing that?

A Just from what my informant told me.

MR. HILL: Objection.

THE COURT: He answered it. He is entitled to cross examination. It is a proper question.

Q Are you suggesting to us here that the informant said they have more heroin on them?

A He said he saw a quantity of heroin, yes, sir.

Q He said a quantity of heroin?

A Yes, sir.

Q Was he referring to the packets that had been passed, to the transaction that had occurred?

A No, sir. He stated to me they had more.

Q He saw a packet of heroin--

A Pardon me?

Q --a packet of heroin. What did you say?

(T-30) A A quantity of heroin.

Q A quantity of heroin?

A Yes, sir.

Q You took them into custody a matter of fifteen, twenty minutes thereafter?

A Approximately.

Q And at that time you patted them down, right?

A Yes, sir.

Q You took them to the station house, right?

A Yes, sir.

Q And when you got to the station house you did a thorough search of their person?

A Yes.

Q Did you find a quantity of heroin?

A No.

Q Did you find a quantity of heroin in your search of the vehicle?

A No, sir.

Q You did not.

A No, sir.

(T-31) Q So, with respect to the statement made to you by the informant that these men either or had a quantity of heroin, you couldn't find any?

A No, sir.

Q Is that right.

THE COURT: You testified about Babarik, too, or just about Penland, because your question was did he find anything on Penland originally?

Q Did you find anything on Babarik?

A No, sir.

Q Any narcotics?

A No.

Q You found nothing on either one of these men, is that correct?

A No narcotics, yes, sir.

Q No narcotics.

MR. QUINN: May I have your Honor's indulgence.

THE COURT: Sure.

Q Officer, showing you your report, I ask you to examine that and tell me whether or not that bears your signature and this is your official report in connection with this matter?

Q Officer, showing you your report, I ask you to examine that and tell me whether or not that bears your signature and this is your official report in connection with this matter?

(T-32) A Yes, sir.

MR. QUINN: I am going to offer it at this time.

THE COURT: Defendant's Exhibit 1.

MR. QUINN: Do you have any objection, sir?

MR. HILL: As far as the exhibit, Mr. Quinn?

THE COURT: It's already an exhibit. I thought you marked it. It may be marked. However, I want to see if there is no objection.

MR. HILL: I have no objection.

THE COURT: Defendant's Exhibit 1.

(The aforementioned document was received and marked as Defendant's Exhibit 1.)

MR. QUINN: Thank you, your Honor.

THE COURT: You can proceed, Mr. Quinn.

BY MR. QUINN:

(T-32) Q Officer, Hunt, were you the one who took the call at the station house from this man whom you described as an informant?

A In the Detective Bureau, yes, sir.

Q You said in the Detective Bureau?

A Yes, sir.

(T-33) Q But you were the gentleman specifically who answered the phone and talked to him or was it Mr. Clisham or Mr. Long?

A It was myself, sir, and in the Detective Bureau.

Q And was it a direct conversation between you and the informant?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q And, the report that you filed in this case is a complete report of what transpired in connection with this arrest, is that right?

A What do you mean by complete report, sir?

Q This is everything that happened?

A No, sir. Something that is not in here is that I did ask the informant if they had more, what kind of a car they were driving.

(T-34) Q And in connection with your arrest report, did you say at any point in that Defendant's Exhibit 1 that you were told that they had a quantity of heroin and were carrying it on their person?

A In this report, sir?

Q Yes.

A No, sir.

Q You make no mention of that?

A No, sir.

Q Right. So that actually you were interested, were you not, in searching them or their car to find out if they had any narcotics, isn't that right?

A I was interested, sir?

Q You were interested, you got information?

A Yes, sir.

Q And part of the information was that they had a quantity of stuff on their person, right?

A Yes, sir.

Q And your objective was to search their person and car and see if they did have it?

A Yes, sir.

Q Isn't that right? So, in order to do that, you went up to their car and said you are under arrest?

A Yes, sir.

(T-35) Q Correct?

A Yes.

Q You are under arrest?

A Yes.

Q And, that was because you speculated that they had some heroin on their person?

A No, sir.

Q From the information you received, right?

A I felt I had probable cause they had possession of heroin.

Q You arrested them?

A Yes, sir.

Q Isn't that right. You weren't arresting them for a transaction that had transpired at Tony's Bar?

A No, sir.

Q That just set you in motion, isn't that right?

A Yes, sir.

Q You were arresting them because you thought, and you used the word, you had probable cause to believe that they had heroin?

A Yes, sir.

Q And you found no heroin on their person?

A No, sir.

(T-38) Q Was Ralph Penland in the bar when you got to Tony's Bar?

A When I got to the bar, sir?

Q When you got to the bar with Officer Clisham and Long.

A They were both coming out.

Q They were walking out?

A Yes, sir.

Q Did they exit the bar together?

A One was in back of the other.

Q One was in back of the other. And, when you conducted the search of this vehicle, where were Penland and Babarik, were they outside the bar?

A Yes, sir.

DETECTIVE THOMAS HUNT--CROSS EXAMINATION

BY MR. MELLON:

(T-42) Q Detective Hunt, other than the set of works and the bottle of methadone, did you take anything else from either one of the defendants?

A Yes, sir. I took a football slip off of Mr. Babarik.

Q And anything else?

A Anything else? And a football line.

Q Anything else?

A Anything else?

THE COURT: What is a line?

A The odds in the football game, sir.

THE COURT: Oh, on the football games.

A Yes.

Q Was there anything else taken from their possession?

A Not that I am aware of, sir.

Q Any money?

A Nothing in the evidence, no, sir.

Q You didn't take any money from--

A Did I take any money? No, sir.

Q To your knowledge did any of the other detectives take anything?

A Not that I know of, I don't know, I couldn't--to my knowledge, no.